Supreme Court, U.S.
FILED
MAY - 5 1994
OFFICE OF THE CLERK

No. 93-1755

In The

Supreme Court of the United States

October Term, 1993

MOBIL OIL CORPORATION,

Petitioner,

v.

TOWN OF CYRIL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY W. DAVIS
Counsel of Record

STEPHEN L. DEGIUSTI
CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Did the Court of Appeals err in extending sovereign immunity from the applicable statute of limitations to a municipal corporation whose cause of action accrued more than 40 years before the filing of its action where the municipality sues alone on its own behalf seeking money damages for injury incurred while engaged in an established private/proprietary function – operation of its municipal water system.

2) Did the Circuit Court abuse its discretion in declining to certify the issue of sovereign immunity from limitations to the Oklahoma Supreme Court under the particular circumstances presented, to wit:

a) The Town of Cyril brought its action in federal court based upon diversity of citizenship, and no federal law issues are presented;

b) Determination of the issue of whether sovereign immunity from limitations applies to a municipal corporation engaged in a private/proprietary function turns on an issue of purely State law interpretation;

c) The District Court, Mobil and originally the Town of Cyril all interpreted the pertinent Oklahoma law directly contrary to the interpretation given by the Court of Appeals;

d) Oklahoma has a certification procedure for submission of questions from federal courts directly to the Oklahoma Supreme Court, 20 O.S. § 1601, et seq. (1991);

QUESTIONS PRESENTED – Continued

e) The Tenth Circuit's decision is directly contrary to its own long-standing precedent and precedent of the Oklahoma Supreme Court which approved application of a two-year statute of limitations to cases factually indistinguishable from this action;

f) A principal case relied upon by the Circuit Court was decided by the Oklahoma Supreme Court *after* entry of summary judgment by the District Court and *after* all briefing had been submitted to the Circuit Court;

g) The Circuit Court denied Mobil's request for leave to brief the new Oklahoma Supreme Court case, and ignored Mobil's suggestion that in light of the new decision the issue of sovereign immunity be certified to the Oklahoma Supreme Court;

h) No Oklahoma State court decision has held that a municipal corporation suing alone for money damages for injury to its water source is entitled to sovereign immunity from limitations; and

i) The Court of Appeals' decision concerns a matter of Oklahoma public policy (the extension of extant sovereign immunity) with immediate and far-reaching effect potentially exposing parties to millions of dollars of liability for heretofore stale, remediless claims.

STATEMENT CONCERNING PARTIES TO THE PROCEEDING

In addition to the parties who appear in the caption of this case, Union Texas Petroleum Energy Corporation, successor by merger to Union Texas Petroleum Corporation, is also a named defendant in the action below.

Petitioner Mobil Oil Corporation advises the Court that its parent/subsidiary companies, excluding wholly-owned subsidiaries, are as follows:

ATAS ANADOLU TASFIYEHANESI A.S.
CANNER'S STEAM COMPANY, INC.
COLLINS PIPELINE COMPANY
FELIX OIL COMPANY
MOBIL CORPORATION
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL DEL PERU (COMPANIA COMERCIAL) S.A.
MOBIL OIL GUINEE
MOBIL OIL NIGERIA PUBLIC LIMITED COMPANY
MOBIL TUNISIE
NEAR EAST DEVELOPMENT CORPORATION
T&M TERMINAL COMPANY

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT CONCERNING PARTIES TO THE PROCEEDING..... iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW..... 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

A. The Undisputed Factual Setting..... 3

B. The Proceedings Below 4

REASONS FOR GRANTING THE PETITION 6

I. The Court of Appeals' Extension of Sovereign Immunity from Limitations to a Municipal Corporation Is Abhorrent to Long-Settled Common Law in this Country and is Contrary to Extant Oklahoma Precedent..... 7

A. The Prerogative of Sovereign Immunity Does Not Extend to Municipal Corporations 7

B. The Court of Appeals' Decision Ignores the Dual Capacity of Municipal Corporations... 9

C. The Circuit Court Altered Oklahoma's Established Test for Sovereign Immunity..... 12

D. The *Schones* Decision Does Not Vary the Established Two-Part Test for Immunity 15

II. The Court of Appeals Abused its Discretion in Failing to Certify the Issue of Immunity from Limitations to the Oklahoma Supreme Court... 18

TABLE OF CONTENTS – Continued

Page

A. The Issue is a Close One 22

B. The Issue Impacts Oklahoma's Public Policy .. 22

C. The Delay Associated with Certification is not Significant Here 23

CONCLUSION 24

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page(s)

CASES

Allstate Ins. Co. v. Brown, 920 F.2d 664 (10th Cir. 1990) 20

Arkansas Fuel Oil Co. v. City of Blackwell, 87 F.2d 50 (10th Cir. 1936) 4, 9, 22

Barnes v. Atlantic & Pacific Life Ins. Co., 514 F.2d 704 (5th Cir. 1975) 20, 21

Bellotti v. Baird, 428 U.S. 132 (1976) 19

Board of County Commissioners v. Willett, 152 P. 365 (Okla. 1915) 7

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 19

Chandler v. Denton, 741 P.2d 855 (Okla. 1987) 8

City of Houston v. Hill, 482 U.S. 451 (1987) 19, 20

City of Muskogee v. Turner, 98 P.2d 1095 (Okla. 1940) 12

City of Roswell v. Mountain States Telephone & Telegraph Co., 78 F.2d 379 (10th Cir. 1935) 7

City of Tulsa v. Roberts, 107 P.2d 1006 (Okla. 1940) 11

County of Boone v. Burlington & Missouri River R. Co., 139 U.S. 684 (1891) 7

Elkins v. Moreno, 435 U.S. 647 (1978) 20

Equilease Corp. v. State Federal Savings & Loan Assoc., 647 F.2d 1069 (10th Cir. 1981) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 18, 21, 22

TABLE OF AUTHORITIES – Continued

Page

Fretz v. City of Edmond, 168 P. 800 (Okla. 1917)..... 12

Garcia v. United States, 43 F.2d 873 (10th Cir. 1930) 7

Grayson v. American Airlines, Inc., 803 F.2d 1097 (10th Cir. 1986)..... 21

Guaranty Trust Co. v. United States, 304 U.S. 126 (1937) 7, 8

Hatfield v. Bishop Clarkson Memorial Hospital, 701 F.2d 1266 (8th Cir. 1983).....23, 24

Hinson v. Cameron, 742 P.2d 549 (Okla. 1987) 21

In re 1973 John Deere 4030 Tractor, 816 P.2d 1126 (Okla. 1991) 8

Krutsinger v. Mead Foods, Inc., 546 F.2d 328 (10th Cir. 1976)..... 24

Krutsinger v. Mead Foods, Inc., 560 P.2d 195 (Okla. 1977)..... 24

Lehman Brothers v. Schein, 416 U.S. 386 (1974)..... 19

Maney v. Oklahoma City, 300 P. 642 (Okla. 1931) ..11, 12

Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1 (1889) 7, 8, 10

Mullaney v. Wilbur, 421 U.S. 684 (1975)..... 19

Oklahoma City Municipal Improvement Authority v. HTB, Inc., 769 P.2d 131 (Okla. 1989) ..... *passim*

Oklahoma Natural Gas Corporation v. City of Enid, 65 P.2d 440 (Okla. 1937)..... 11

Public Service Co. v. City of Tulsa, 50 P.2d 166 (Okla. 1935).....10, 11

Reynolds v. Sims, 377 U.S. 533 (1964) 8

TABLE OF AUTHORITIES – Continued

Page

Shell Petroleum Corp. v. Town of Fairfax, 69 P.2d 649 (Okla. 1937) 9, 22

State ex rel. Bd. of County Commissioners of Muskogee County v. Shelton, 727 P.2d 103 (Okla. Ct. App. 1986) 18

State ex rel. Land Commissioners v. Hall, 128 P.2d 838 (Okla. 1942) 12, 14, 15

State ex rel. Schones v. Town of Canute, 858 P.2d 436 (Okla. 1993) ..... *passim*

State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976), *cert. denied*, 429 U.S. 829 (1976) 21, 22, 23

Town of Cyril v. Mobil Oil Corp., 11 F.3d 996 (10th Cir. 1993) 1

Thompson v. Magnolia Petroleum Corp., 309 U.S. 478 (1940) 19

Virginia v. American Booksellers Assoc., Inc., 484 U.S. 383 (1988) 19

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

Okla. Stat. 1931, Section 101 (sub. 3) 4

Okla. Stat. 1931, Section 6071 4

Okla. Stat. 1931, Section 6072 4

11 O.S. § 37-115 (1991) 2, 4

11 O.S. § 37-116 (1991) 2, 4

TABLE OF AUTHORITIES – Continued

Page

12 O.S. § 92 (1991) 2

12 O.S. § 95 (1991) 2, 4

20 O.S. § 1601 (1991) 20

60 O.S. § 179 (1991) 13

62 O.S. § 371 (1991) 16

62 O.S. § 372 (1991) 16, 17, 18

62 O.S. § 373 (1991) 16, 17

Fed. R. App. P. § Rule 28(j) 6

MISCELLANEOUS

Dillon on Municipal Corporations § 668 7

Dillon on Municipal Corporations § 1188 11

Dillon on Municipal Corporations § 1303 10

Early Oklahoma Oil, K. Franks, et al. (Tex. A. & M. Univ. Press, 1981) 9

The Rush Begins: A History of the Red Fork, Cleveland and Glen Pool Oil Fields, K. Franks (Okla. Heritage Asso. 1984) 9

No. _____

In The

Supreme Court of the United States

October Term, 1993

MOBIL OIL CORPORATION,

Petitioner,

v.

TOWN OF CYRIL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mobil Oil Corporation ("Mobil") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit reversing summary judgment entered by the District Court in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-6) is reported at 11 F.3d 996. The order of the Court of Appeals denying Petitioner's Petition For Rehearing and Suggestion For Rehearing In Banc (App. 7-8) is unreported. The

orders of the District Court granting summary judgment and denying Respondent's motion to reconsider (App. 9-24) are unreported.[1]

JURISDICTION

On December 14, 1993, the Tenth Circuit entered its decision reversing the Trial Court's grant of summary judgment and remanding the case for further proceedings. On February 7, 1994, the Court of Appeals entered its Order denying Petitioner's Petition For Rehearing and Suggestion For Rehearing In Banc. (App. 7-8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 O.S. §§ 92, 95 (Third) and 11 O.S. §§ 37-115, 37-116 (1991). The pertinent provisions of each are set forth in the Appendix. (App. 25-26).

STATEMENT OF THE CASE

The Town of Cyril ("Cyril") is an Oklahoma municipal corporation located in Caddo County, some 70 miles

[1] References to the appendix attached hereto are designated by the abbreviation "App." Although not filed with this Court yet, references to the Record below are cited where pertinent. For example, the appellant's appendix before the Court of Appeals is designated by the abbreviation "R. Aplt. App."

southwest of Oklahoma City. Cyril has a population of approximately 1,200 persons. (R. Aplt. App. at 45, 50). On September 13, 1990, Cyril brought a diversity action against Mobil and two other oil companies. The sole remedy sought is recovery of money damages for the contamination of area groundwater which Cyril previously utilized for its municipal water source.

A. The Undisputed Factual Setting

The pertinent facts are not in dispute and are adequately detailed in the orders of the Trial Court and the Court of Appeals. (App. 1-6, 9-19). Briefly stated, in the 1920s Cyril began to utilize water wells located on private property some two miles north of the Town to supply water for its municipal water system. The water wells were located within an active oil and gas field. The Town leased the right to withdraw groundwater from the local landowners on a year to year basis. (App. 2, 10).

By 1947, Cyril began to experience elevated chloride levels in its water wells and complained to the Oklahoma Planning and Resources Board ("OPRB") that the wells were being polluted by saltwater from area oil and gas operations. (App. 3, 10). By 1948, Cyril abandoned two of its then existing three water wells due to chloride contamination. By 1952, Cyril abandoned its third water well due to the contamination, and drilled additional wells just south of the abandoned ones. (App. 3, 11). Groundwater in this area is known to flow in a south/southwesterly direction. The contamination migrated south to the new wells, and by 1975, four of Cyril's existing five wells were likewise abandoned due to high chloride

levels. By 1989, Cyril's last three wells, also drilled farther to the south, likewise showed elevated chloride levels, and in October of that year, Cyril entered a consent order with the State Department of Health to obtain a different water supply. (App. 3, 10-11). This action was commenced September 13, 1990.

B. The Proceedings Below

The District Court granted Mobil's motion for summary judgment finding that "[t]he undisputed evidence shows that Cyril discovered more than two years before September 13, 1990 that the groundwaters . . . were contaminated with chlorides from the use of saltwater in the Defendants' oil and gas operations." (App. 15). In so holding, the Court applied 12 O.S. § 95 (Third) which provides for a two-year limitations period. Cyril has not questioned that if a limitations period applies, this is the applicable time period.

The District Court relied upon *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50 (10th Cir. 1936). Like this case, *Arkansas Fuel* was an action in which an Oklahoma municipality sued for injury to its municipal water supply. There, the Tenth Circuit held that Oklahoma's two-year limitations period applies to such an action. 87 F.2d at 52.[2]

---

[2] The pertinent law applied by the Tenth Circuit in 1936 has not changed. Sections 6071 and 6072, Okla. Stat. 1931, and Section 101 (sub. 3), Okla. Stat. 1931, *see* 87 F.2d at 52, are substantially identical to 11 O.S. §§ 37-115, 37-116 and 12 O.S. § 95 (Third), respectively, which existed at the time Cyril's action was commenced.

The District Court specifically considered and rejected Cyril's assertion that it was entitled to sovereign immunity from limitations under the maxim *nullum tempus occurrit regi*. (App. 16-18). On October 13, 1992, the District Court denied Cyril's motion for reconsideration, again considering and rejecting the sovereign immunity argument. In so doing, the Trial Court noted that controlling Oklahoma Supreme Court precedent required *both* sovereign capacity *and* assertion of a public right for sovereign immunity from limitations to obtain.[3] (App. 22). The District Court concluded that "[r]egardless of whether the right asserted in this case is a public right, the Court is convinced that the Plaintiff town is not bringing this suit in a sovereign capacity." (App. 23).

On appeal, the Tenth Circuit reversed, relying in part upon a new decision of the Oklahoma Supreme Court handed down *after* entry of summary judgment and *after* briefing to the Court of Appeals had concluded.[4] The Court of Appeals concluded that presented with the facts at hand the Oklahoma Supreme Court "would hold that the Town of Cyril acted in a sovereign capacity. . . . The statute of limitations therefore does not apply to bar the action." (App. 5-6).

---

[3] The District Court relied upon *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988). In *HTB*, two of the three Plaintiffs were created by statute as agencies of the State of Oklahoma, and the District Court found that fact distinguished the case from Cyril's. (App. 16-17, 21-23). *HTB* is discussed in detail *infra* at 12-15.

[4] *State ex rel. Schones v. Town of Canute*, 858 P.2d 436 (Okla. 1993). As discussed *infra* at 15-18, the Tenth Circuit's reading of *Schones* is misplaced.

The Circuit Court denied a request by Mobil made after oral argument to submit a brief on the new Oklahoma Supreme Court decision.[5] (App. 6). On February 7, 1994, the Court denied Mobil's Petition for Rehearing and Suggestion for Consideration In Banc, and disregarded a suggestion contained therein that it certify the question of sovereign immunity to the Oklahoma Supreme Court. (App. 7-8; *See* R. Petition for Rehearing at 14-15).

REASONS FOR GRANTING THE PETITION

Contrary to long-standing Tenth Circuit and Oklahoma Supreme Court precedent, the decision of the Court of Appeals extends sovereign immunity from limitations to a non-sovereign municipal corporation suing alone more than 40 years after its action accrued for money damages for injury suffered while engaged in a private/proprietary enterprise. The decision is not only erroneous, but alters Oklahoma public policy. Under the Tenth Circuit's opinion, not only are untold ancient municipal claims raised from the dead, but henceforth such claims are given eternal life, affecting not only citizens of Oklahoma, but those of other states and nations conducting business in Oklahoma. The issue is thus an important one. Additionally, given the local significance

[5] The *Schones* case was brought to the Court of Appeals' attention by letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. The rule does not, however, permit briefing or argument regarding supplemental authorities. Thus, the parties were not given an opportunity to brief the case to the Tenth Circuit.

of the issue, and the fact that the question posed is purely one of State law, the Court of Appeals should have certified the issue to the Oklahoma Supreme Court.

I. The Court of Appeals' Extension of Sovereign Immunity from Limitations to a Municipal Corporation Is Abhorrent to Long-Settled Common Law in this Country and is Contrary to Extant Oklahoma Precedent.

A. The Prerogative of Sovereign Immunity Does Not Extend to Municipal Corporations.

More than a century ago, this Court recognized as well-settled that municipal corporations are subject to the ordinary rules that govern the law of procedure between private persons and therefore *are* subject to general statutes of limitation. *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889). There, the Court noted that the maxim *nullum tempus occurrit regi* applies to the *sovereign*, and, therefore, the United States and the several States are not, without express words indicating the contrary, bound by statutes of limitation. The Court recognized, however, that municipal corporations are not sovereign and therefore are *not* immune from the operation of statutory limitations. 132 U.S. at 11 (quoting from Dillon on Municipal Corporations § 668).[6]

---

[6] The teaching of *Metropolitan Railroad* has been oft cited. *See, e.g., County of Boone v. Burlington & Missouri River R. Co.*, 139 U.S. 684, (1891); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 135 fn 3 (1937); *Garcia v. United States*, 43 F.2d 873 (10th Cir. 1930); *City of Roswell v. Mountain States Telephone & Telegraph Co.*, 78 F.2d. 379 (10th Cir. 1935); *Board of County Commissioners v. Willett*, 152 P. 365 (Okla. 1915).

The *Metropolitan Railroad* Court noted that the prerogative of immunity is that of the sovereign alone.[7] Although the State's grantees (municipalities) are created by the State, they are not sovereign and are therefore in the same category as natural persons. Thus, the Court concluded, "It is just as much for the public interest and tranquility, that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be." *Metropolitan Railroad*, 132 U.S. at 11.[8]

Contrary to the teaching of *Metropolitan Railroad*, the Court of Appeals held that Cyril, a non-sovereign municipal corporation, may prosecute a money damages action some 42 years after its cause of action accrued. Indeed, under the Court of Appeals' analysis, Cyril could bring its claim 100 or 1000 years hence, or even beyond.

In so ruling, the Circuit Court not only disregarded long-standing precedent from both the Tenth Circuit and the Oklahoma Supreme Court approving application of

---

[7] This Court has recognized that political subdivisions of States "never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).

[8] It is universally accepted that statutes of limitation serve a public interest to protect citizens from stale and vexatious claims, and make an end to the possibility of litigation after the lapse of a reasonable time. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1937). *See Equilease Corp. v. State Federal Savings & Loan Assoc.*, 647 F.2d. 1069, 1073 (10th Cir. 1981); *In re 1973 John Deere 4030 Tractor*, 816 P.2d 1126, 1131 (Okla. 1991); *Chandler v. Denton*, 741 P.2d 855, 863 (Okla. 1987).

limitation periods in cases factually indistinguishable,[9] but also misconstrued recent Oklahoma decisions and thereby *extended* Oklahoma's *nullum tempus* doctrine beyond its recognized and logical boundaries. The effect of the Court of Appeals' erroneous decision is at once far reaching and significant.

B. The Court of Appeals' Decision Ignores the Dual Capacity of Municipal Corporations.

By judicial fiat, potentially hundreds of ancient and stale municipal claims for damages have been resurrected and granted immortality.[10] Likewise troubling, the Tenth Circuit's opinion gives eternal life to a municipality's claims which may arise in the future whenever those claims may be said to affect public rights. (App. 5). The trouble with the Court of Appeals' reasoning is that it not only ignores but henceforth emasculates a distinction which lies at the very essence of a municipal corporation, an appreciation for which is critical to proper application of the *nullum tempus* rule.

---

[9] *See Arkansas Fuel Oil Co. v. City of Blackwell, supra; Shell Petroleum Corp. v. Town of Fairfax,* 69 P.2d. 649 (Okla. 1937).

[10] Oil production in Oklahoma began before 1900. Many of the State's cities and towns had their genesis as oil boom towns or were sites of major oil fields. Early oil production occurred in literally dozens of Oklahoma towns. Literature concerning the era is replete with examples of what would today be environmentally unacceptable practices. *See Early Oklahoma Oil,* K. Franks et al. (Tex. A. & M. Univ. Press, 1981); *The Rush Begins: A History of the Red Fork, Cleveland and Glen Pool Oil Fields,* K. Franks (Okla. Heritage Asso. 1984). The potential for ancient municipal claims is staggering.

As Judge Dillon, cited by this Court in *Metropolitan Railroad*, notes,

> municipal corporations . . . possess two classes of powers; . . . those which are granted for *public purposes exclusively* [and which] belong to the body corporate in its public, political, or municipal character, and are *legislative and governmental* in their nature, . . . [and those granted] for the purpose of *private advantage and emolument*, [which] though the public may derive a common benefit therefrom, the corporation acts in a *private or proprietary capacity*.

Dillon on Municipal Corporations § 1303. (Emphasis in original).

The Oklahoma Supreme Court has noted that most of what a municipal corporation does can be viewed as affecting public rights and having a public nature. However, that Court has consistently recognized the dual capacity of municipal corporations and given effect to the different results which obtain from the distinction between the two capacities.

In *Public Service Co. v. City of Tulsa*, 50 P.2d 166, Syll. 2 (Okla. 1935), the Court said:

> While in a general sense the functions of a municipal corporation are all of a public nature, it nevertheless acts in a dual capacity, the one governmental and the other proprietary, or "quasi-private." In its *governmental capacity* a municipality *acts mainly as an arm of the state* for the convenient administration of the government in the incorporated territory, *for the public good on behalf of the state* rather than for itself. In its *proprietary, private, or quasi-private capacity* a

> municipality *acts mainly for its own ends*, purposes, and benefits, separately from or in addition to the burdens and benefits imposed or conferred upon it by the state.

(Emphasis added). *See also Oklahoma Natural Gas Corporation v. City of Enid*, 65 P.2d 440, Syll. 1 (Okla. 1937); *City of Tulsa v. Roberts*, 107 P.2d 1006, 1007 (Okla. 1940); *Maney v. Oklahoma City*, 300 P. 642 (Okla. 1931).

Properly applied, sovereign immunity from limitations extends to a municipal corporation *only* where it acts in its governmental role as an agent of the State, and therefore in a sovereign capacity. Indeed, Judge Dillon makes this clear:

> Although municipal corporations are public agencies, exercising, on behalf of the State, public duties, yet they also exercise and acquire what the courts have called rights in a private and proprietary capacity rather than in a public and governmental capacity, and such corporations are not exempt from the operation of limitation statutes in cases wherein arise questions involving property or contracts which do not pertain to the authority of the State which is exercised through them, but pertain to the private and contractual rights of the municipality, and such statutes run in favor of and against these corporations with respect to these private and proprietary rights and obligations in the same manner and to the same extent as against natural persons.

Dillon on Municipal Corporations § 1188.

It has long been settled in Oklahoma that in operating a municipal water system, a city or town acts in a

private, proprietary capacity rather than a governmental capacity, and therefore "the rights of the city are to be determined largely upon the same principles which govern the acts of individuals or corporations in transacting the same quasi public services." *Fretz v. City of Edmond*, 168 P. 800, 802 (Okla. 1917). *See City of Muskogee v. Turner*, 98 P.2d. 1095 (Okla. 1940); *Maney, supra.*

The Tenth Circuit's decision changes all that. Despite the fact that the Town of Cyril is not a sovereign, that it sues alone in its corporate capacity for its own monetary benefit, and that it seeks money damages arising from a private/proprietary function, the Court of Appeals ruled that Cyril is bestowed with sovereign immunity from limitations.

C. The Circuit Court Altered Oklahoma's Established Test for Sovereign Immunity.

In holding that Cyril is immune from limitations, the Court of Appeals relied upon just two cases: *HTB* and *Schones, supra.*[11] As the District Court correctly recognized, in *HTB* the Oklahoma Supreme Court set forth a *two-step test* for application of sovereign immunity from limitations. First, the governmental entity must be acting in a sovereign capacity, *and* second, the rights which it seeks to enforce must rise to the level of public rights. 769 P.2d at 134. (*See* App. 23).

In *HTB*, two municipal trust authorities, public trusts created by statute *as agencies of the State*, were joined by

---

[11] The Circuit Court cited just one other case, *State ex rel. Land Commissioners v. Hall*, 128 P.2d 838 (Okla. 1942).

their trust beneficiary, the City of Oklahoma City, as plaintiffs seeking to recover damages for the negligent design and construction of a water pipeline. 769 P.2d at 132, 136. The Oklahoma Supreme Court held that the action was not subject to the statute of limitations.

As the District Court correctly observed, "the [*HTB*] Court's decision turned upon the fact that the trust plaintiffs were functioning as agencies of the state under Title 60 Okla. Stat. § 179," and thus sovereign capacity was satisfied. (App. 17).[12] The *HTB* Court *then* turned to the issue of whether the rights sought to be enforced affected generally the population as a whole and were therefore "public rights." 769 P.2d at 135. Thus, as the District Court noted, "The *HTB* Court treated the elements of sovereign capacity and public rights as *distinct concepts to be analyzed separately*, each of which is required in order to assert sovereign immunity from limitations." (App. 22). (Emphasis added).

---

[12] Cyril first raised immunity from limitations in its supplemental brief opposing summary judgment. Interestingly, at that time Cyril too recognized that critical to the *HTB* Court's holding that plaintiffs there were immune from the operation of the statute of limitation was the presence of the State-agency municipal trust authorities. Cyril acknowledged that as a municipal corporation suing alone for injury to its water supply it *did not* appear in a sovereign capacity and, therefore, *was not entitled to sovereign immunity*. (R. Aplt. App., p. 226-28). After losing its battle against summary judgment, Cyril sought reconsideration arguing that its original reading of *HTB* was "erroneous". (R. Aplt. App., p. 310-11; App. 20).

In its decision, however, the Court of Appeals bypassed the first prong of the test and instead determined that if a political subdivision is seeking to enforce a right which affects the public, it in fact is acting in a sovereign capacity. (App. 5). This pronouncement is at odds with *HTB* and obliterates the dual capacity distinction which defines a municipal corporation.

Relying upon particular language in *HTB*, the Court of Appeals concluded that the Oklahoma Supreme Court abandoned the governmental/proprietary function distinction in determining whether sovereign capacity is established. (App. 5). However, careful review of *HTB* demonstrates that this is simply not so. Rather, the *HTB* Court's discussion of function concerns the *second* part of the sovereign immunity test – whether the sovereign seeks to enforce public as opposed to private rights.[13]

---

[13] In *HTB*, after announcing the two-part test, the *HTB* Court then noted that in determining whether *the sovereign* may claim immunity from limitations, some jurisdictions look to the function performed. 769 P.2d at 134. In refusing to follow the function test in determining whether *the sovereign* may claim immunity, the *HTB* Court quoted from its decision in *State ex rel. Land Commissioners v. Hall*, 128 P.2d 838 (Okla. 1942), "We will not attach 'controlling importance to the source through which or from which *the state* acquires the right rather than the nature of the right and whether the failure of its enforcement affects public as distinguished from private enterprise.' " 769 P.2d at 135 (Emphasis added). In *Hall*, the *State of Oklahoma* was the plaintiff. Thus, there was no question that sovereign capacity was present, and part one of the test was satisfied. For sovereign immunity from limitations to apply, then, only the second part of the test was at issue – whether the sovereign was seeking to enforce "public" rights. It was in this regard that the Court announced it would not give controlling weight to the source

In *HTB*, the Court found it necessary to examine and satisfy *the first part of the test* because the State was not a plaintiff. The Court found that because the municipal trust authority plaintiffs acted as *agencies of the State*, they in fact appeared in a sovereign capacity. 769 P.2d at 135. Only then did the Court consider part two of the test – whether the rights at issue affected the public generally. *Id.* If the Court of Appeals' reading of *HTB* were correct, then that portion of the opinion which discusses sovereign capacity becomes trivial verbiage. Since a political subdivision was suing as plaintiff, under the Circuit Court's view, the Oklahoma Supreme Court only needed to determine whether the rights at issue affected public rights for sovereign immunity to lie.

Since it is *only when a municipality acts in its governmental/legislative role that sovereign capacity attaches*, where a town sues alone the Court *must* examine the function involved to determine whether *part one* of the *HTB* test is satisfied. Relying upon its misplaced reading of *HTB* and *Schones*, however, the Court of Appeals passed over this critical analysis.

D. The *Schones* Decision Does Not Vary the Established Two-Part Test for Immunity.

Schones was a *qui tam* action brought by resident taxpayers in the name of the State of Oklahoma to recover

---

from which *the State* acquired the right, but rather would look to the nature of the right itself. 128 P.2d at 840. The *Hall* case differs fundamentally from the case at bar where a non-sovereign appears as plaintiff, and, therefore, sovereign capacity must first be established.

a penalty against former Town of Canute officials pursuant to the express provisions of 62 O.S. §§ 372, 373 (1991).[14] The suit had nothing in common with the facts of this case, and does not support the Court of Appeals' expansive interpretation of Oklahoma's *nullum tempus* doctrine.

In *Schones*, the Court ruled that the taxpayers' action was not barred by the applicable one-year limitations period even though the alleged wrongful conduct occurred some 10 years before the action was filed. Contrary to the Court of Appeals' reading, however, the *Schones* Court did *not* hold that the taxpayers were immune from limitations.[15] Rather, the Court applied the

---

[14] Title 62 of the Oklahoma Statutes governs Public Finance. In particular, sections 371-373 concern misappropriation of public funds. Section 372, as a penalty, makes officers of the state, counties, municipalities and school districts personally liable for triple the amount of any fraudulent or illegal payment made or authorized by said officer and creates a cause of action in favor of the affected governmental entity. Section 373 provides that where, after demand, the government entity involved fails or refuses to maintain the § 372 action, the action may be brought by resident taxpayers in the name of the State of Oklahoma as plaintiff. In such case, the taxpayer receives one-half of any recovery as a reward.

[15] The Court of Appeals' misreading of *Schones* is demonstrated by its conclusion that the *Schones* Court not only held that under the *nullum tempus* doctrine the Town of Canute would not have been barred by the statute of limitation had it sued, but that the Oklahoma Supreme Court "then *extended the doctrine further* and held that resident taxpayers of the Town of Canute were not barred from bringing the action on behalf of the town when the town officials refused to do so." (App. 4-5) (Emphasis added).

limitations period, but found that the taxpayers' cause of action did not accrue until demand that an action be brought by the Town officials was made upon the Town's officers and the latter failed to act. 858 P.2d at 440. Since the taxpayers filed suit within five months of their demand, the action was not barred by the one-year limitations period. *Id.*

However, because far more than one year had passed since the ex-officials had committed the alleged wrongs, the Court initially examined whether the action would have been time-barred if the Town of Canute itself had prosecuted the action under § 372. Presumably, if the underlying § 372 action of the government entity itself were barred by limitations, then the derivative taxpayers' action under § 373 would likewise be time-barred. In this regard, the Court found that limitations would not have barred the suit had it been brought by the Town itself "because the proper officers of the Town of Canute would be acting *in a sovereign capacity for vindication of public rights.*" 858 P.2d at 440. (Emphasis added).

The *Schones* decision does *not* alter *HTB's* two-part sovereign capacity/public rights test, and certainly does not pronounce that in prosecuting a money damages lawsuit for injury to its water source a city or town acts in a sovereign, governmental capacity. To the contrary, *Schones* is consistent with the traditional two-part immunity test. First, sovereign capacity was present because were the Town suing under § 372 it *would* be acting in its *governmental/legislative capacity*. The § 372 action is one to enforce a statute created to assure that public officials

discharge their duties "fraudlessly without bribes, kickbacks or payoffs." As such, it is "a paramount *governmental* undertaking." *State ex rel. Bd. of County Commissioners of Muskogee County v. Shelton*, 727 P.2d 103, 107-108 (Okla. Ct. App. 1986) (Emphasis added), (cited by the Court in *Schones)*. Second, as the *Schones* Court noted, in a § 372 action the ultimate right at issue is the vindication of the public's right against wrongful actions by its public officials. 858 P.2d at 439. Thus, *both* parts of the *HTB* test were satisfied.

Here, in suing alone for injury to its municipal water source Cyril does not act in a governmental *qua* sovereign capacity and therefore is not entitled to immunity from limitations.[16] The Circuit Court's ruling to the contrary is erroneous.

II. The Court of Appeals Abused its Discretion in Failing to Certify the Issue of Immunity from Limitations to the Oklahoma Supreme Court.

This is a diversity action. Although the action involves purely State law rights and remedies, and could have been prosecuted in the courts of Oklahoma, Cyril chose the federal court forum. Thus, in determining the issues presented, the federal courts are bound to apply Oklahoma law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

This Court has long recognized the desirability of submitting dispositive questions of purely State law to

---

[16] Since Cyril cannot satisfy part one of the *HTB* test, the issue of whether public rights are affected need not be reached.

State courts in appropriate circumstances. *See Thompson v. Magnolia Petroleum Corp.*, 309 U.S. 478, 484 (1940). There, the Court said, "unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have – by the accident of Federal jurisdiction – been determined contrary to the law of the State which in such matters is supreme." And in *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), the Court noted that "state courts are the ultimate expositors of state law."

In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court, although declining to mandate certification in all cases involving interpretation of unclear state law, endorsed certification in appropriate circumstances, noting that "[i]t does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." 416 U.S. at 391. The Court concluded that in the case before it, resort to certification by the Court of Appeals "would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law. . . . " *Id.*[17]

---

[17] Since *Lehman*, the Court (as well as individual members thereof) has continued to extoll the virtues of certification as an expeditious method of obtaining construction of uncertain issues of State law. *See Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 393-396 (1988); *Bellotti v. Baird*, 428 U.S. 132, 150-151 (1976). As Justice O'Connor has noted, "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring). *See also City of Houston v. Hill*, 482 U.S. 451, 475 and fn 2 (1987) (Scalia, J., concurring).

In addition to the usefulness of certification where the federal court is presented with uncertain questions of State law, *see City of Houston v. Hill*, 482 U.S. 451, 471, fn 23 (1987), where the issue is "intensely local and immensely important to a wide spectrum of State government activities" it is obviously desirable that such questions of law be decided in the first instance by State courts. *Elkins v. Moreno*, 435 U.S. 647, 662 at fn 16 (1978). As the Court noted in *Elkins*, while certification may not always be required, "where . . . there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it." *Id.*[18]

As have other Courts of Appeals, the Tenth Circuit has recognized that "Certification is particularly appropriate where the legal question at issue is novel and the applicable state law is unsettled." *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th Cir. 1990). Likewise, in *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704, 706 (5th Cir. 1975), the Fifth Circuit noted, "When the state law is in doubt especially on the underlying public policy aims, it is in the best administration of justice to afford

---

[18] Most states today have specific legislation providing a mechanism for certification. Oklahoma adopted the Uniform Certification of Questions of Law Act over 20 years ago. *See*, e.g., 20 O.S. § 1601 *et seq.* Indeed, a majority of states, as well as the District of Columbia and Puerto Rico, have adopted the Uniform Act. (Ala., Alaska, Ariz., Colo., Conn., Fla., Ga., Ind., Iowa, Kan., Ky., La., Maine, Md., Mass., Minn., Miss., N.H., N.M., N.D., Ohio, Oregon, R.I., S.D., Wash., W. VA., Wis., Wy.) Five other states too have adopted certification statutes. (Neb., Hi., Mo., Mont., S.C.).

the litigants a consistent final judicial resolution by utilizing the certification procedure."

The *Barnes* Court also pointed out that a federal court's failure to certify questions in appropriate cases not infrequently results in a Federal Court of Appeals being "reversed" by the highest court of the *Erie* state. 514 F.2d at 706.[19] As the Fifth Circuit observed in *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976), *cert. denied*, 429 U.S. 829, (1976), regardless of the confidence of the Court of Appeals, only the highest state court can decide a state law question "in a manner that is by definition, correct."

In *Shevin*, the Fifth Circuit described factors which it believed should be considered in exercising the court's discretion whether to certify a question of state law. Regarding the many factors it considers, the Court said,

> The most important are the closeness of the question and the existence of sufficient sources of state law – statutes, judicial decisions, attorney general's opinions – to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to

---

[19] Misinterpretation of Oklahoma precedent by the Tenth Circuit is not unknown. *Compare Grayson v. American Airlines, Inc.*, 803 F.2d 1097, 1099 (10th Cir. 1986), with *Hinson v. Cameron*, 742 P.2d 549, 552 (Okla. 1987).

> produce a helpful response on the part of the state court.

526 F.2d at 274-75. The criteria developed by the Fifth Circuit favor certification in this case.

A. The Issue is a Close One.

The fact that the District Court, Mobil *and* initially Cyril, all read *HTB* differently than the Tenth Circuit speaks volumes about the closeness of the question posed. No Oklahoma appellate court has expressly discussed whether a municipal corporation suing alone for money damages for injury to its municipal water source enjoys sovereign immunity from statutes of limitation.[20] As noted, however, Oklahoma and Tenth Circuit precedent have approved application of a two-year limitations period to cases factually indistinguishable from this case. *See Town of Fairfax*, and *Arkansas Fuel, supra.*

B. The Issue Impacts Oklahoma's Public Policy.

The concern for comity also bodes in favor of certification here. Unlike the *Shevin* case, this action *is* a pure *Erie* diversity action and turns solely upon the interpretation of State law. That interpretation can be given with absolute certainty only by the Oklahoma Supreme Court. Moreover, ultimately the resolution of the issue depends

---

[20] As can be seen, there is no difficulty framing a specific question for certification. This fact too, under the Fifth Circuit's approach, favors certification here.

upon a matter of public policy: whether Oklahoma's version of the *nullum tempus* doctrine should extend to a municipal corporation engaged in a private/proprietary function. The answer has extremely significant impact, not only for Oklahoma municipal corporations, but also for those who may now or in the future be required to defend ancient municipal claims.

C. The Delay Associated with Certification is not Significant Here.

Finally, the concern for delay does not militate against certification here. In *Shevin*, the Court expressed concern that the delay caused by certification would negatively impact the massive and time-consuming discovery which would have to be done in the case. Based upon the Court's determination that the state question was not a close one and that comity was not a real concern there, the delay aspect helped tip the scales against certification. 526 F.2d at 275-76. The aspect of delay does not weigh as heavily here.

As the Eighth Circuit noted in *Hatfield v. Bishop Clarkson Memorial Hospital*, 701 F.2d 1266, 1268-69 (8th Cir. 1983):

> The argument that valuable discovery time will have elapsed carries little weight in light of the fact that plaintiff's parents waited thirteen years to file this action and it now has been more than seventeen years since the medical services were rendered. Valuable discovery time appears to have already passed. Delay in the factual context of the present case does not outweigh the significant principle of comity.

Here, Cyril waited over 40 years after it learned of the contamination of its water supply before it filed its lawsuit. Additional time to determine the law of Oklahoma on a question with such far reaching implications should not be a matter for concern.[21] Not only would certification promote the policy of comity, but it would in the long run save time, energy and resources by requiring a trial on the merits only if the Tenth Circuit's conjecture about how the Oklahoma Supreme Court would rule proved correct. The Court of Appeals abused its discretion in failing to certify the State law issue to the Oklahoma Supreme Court.

CONCLUSION

The Court of Appeals has erroneously extended sovereign immunity from limitations to a non-sovereign municipal corporation suing alone for money damages sustained while engaged in a private/proprietary function. The decision is an unwarranted expansion of Oklahoma law and this Petition for a Writ of Certiorari should be granted or the decision of the Court of Appeals summarily vacated and the judgment of the District Court affirmed. Alternatively, the Petition should be granted and the question certified to the Oklahoma Supreme

---

[21] There is evidence of effective and efficient certification under Oklahoma's procedure. *See*, e.g., *Krutsinger v. Mead Foods, Inc.*, 546 F.2d 328 (10th Cir. 1976) (question certified 11-23-76) and *Krutsinger v. Mead Foods, Inc.*, 560 P.2d 195 (Okla. 1977) (certified question answered 2-1-77).

Court, or the Court of Appeals' decision vacated and the case remanded for certification.

Respectfully submitted,

GARY W. DAVIS
Counsel of Record

STEPHEN L. DEGIUSTI
CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Counsel for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TOWN OF CYRIL, a municipal corporation, Plaintiff-Appellant, v. MOBIL OIL CORPORATION, a New York corporation; and UNION TEXAS PETROLEUM CORPORATION, a Delaware corporation, Defendants-Appellees.	)	No. 92-6373 (Filed Dec. 14, 1993)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-91-702-R)

D. Craig Shew (Michael G. Smith, with him on the briefs), of Smith, Shew & Scrivner, P.C., Ada, Oklahoma, for Plaintiff-Appellant.

Gary W. Davis (Stephen L. Degiusti with him on the brief), of Crowe & Dunlevy, Oklahoma City, Oklahoma), for Defendant-Appellee Mobil Oil Corporation.

Kenneth N. McKinney (Robin F. Fields with him on the brief), of McKinney, Stringer & Webster, P.C., Oklahoma

City, Oklahoma, for Defendant-Appellee Union Texas Petroleum Corporation.

Before LOGAN, SEYMOUR, and MOORE, Circuit Judges.

SEYMOUR, Circuit Judge.

The Town of Cyril, an Oklahoma municipality, brought this action against Mobil Oil Corporation and Union Texas Petroleum Corporation for contamination of the town's ground water supply. The district court held the town's claims barred by the statute of limitations as a matter of law, and granted both defendants' motions for summary judgment. Town of Cyril appeals, and we reverse.

I.

In 1923, the Town of Cyril began operating a municipal water supply and selling water to its citizens and neighboring residents. The source of the water was groundwater obtained from wells located approximately two miles north of the town. The town did not own the land, but had the right to withdraw the groundwater by virtue of leases or easements with individual landowners. Between 1923 and January 1991, the town used a total of ten water wells.[1]

---

[1] In February 1991, the Town of Cyril began purchasing water from a rural water district.

In 1947, the town began to experience elevated chloride levels in its water wells and complained to the Oklahoma Planning and Resources Board (OPRB) that the wells were being polluted by saltwater from area oil and gas operations. The OPRB responded by requesting that oil companies voluntarily cease disposing of saltwater into earthen disposal pits.

By 1948, the town had to abandon two of its then existing three water wells due to chloride contamination. By 1952, a third well was abandoned for the same reason. The OPRB, along with other State agencies, investigated the problem and concluded that the pollution was due to saltwater disposal by area oil and gas operators. The OPRB once again requested that operators cease surface disposal of saltwater. The town drilled additional wells just south of the abandoned wells. As of 1966, all five of the wells which the town was using were above natural chloride levels. By 1975, four of these wells were abandoned by the town. In 1981, the town began to withdraw water from a replacement well. By 1987, the town's water superintendent believed that the remaining two wells would have to be abandoned due to the chloride contamination, and obtained another new well. The chloride levels continued to increase in the older wells, and the new well was in danger of becoming contaminated.

On September 13, 1990, the town filed this diversity action in the United States District Court for the Western District of Oklahoma, seeking damages for the loss of its municipal water supply allegedly caused by Mobil Oil

Corporation and Union Texas Petroleum Corporation.[2] The district court granted both defendants' motions for summary judgment, holding the town's claims barred by the statute of limitations. In making this determination, the court held that the town did not bring the suit in a sovereign capacity, and thus was not entitled to sovereign immunity from the statute of limitations.

II.

The Oklahoma Supreme Court stated in *Oklahoma City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 133 (Okla. 1989), that statutes of limitation do not generally apply to a governmental entity if it is acting in its "sovereign capacity to vindicate public rights." In a decision handed down after the district court granted summary judgment in this action, the Oklahoma Supreme Court again reiterated that "the maxim *nullum tempus occurrit regi* (time does not run against the King) applies to municipal corporations as trustees of the rights of the public." *State ex rel. Shones v. Town of Canute*, 858 P.2d 436, 439 (Okla. 1993). *In Shones*, the court said that the statute of limitations would not bar officers of the Town of Canute from bringing an action for money damages against corrupt officials. *Id.* at 440.[3] The court then

---

[2] Citation Oil & Gas Corporation and Citation 1989 Investment Limited Partnership were also joined as defendants in the town's complaint, but were subsequently dismissed by the town.

[3] It is apparent that the municipality need not be suing as an agency of the state, as it did in *HTB*, in order to avoid the statute of limitations bar; no such agency existed in *Shones*.

extended the doctrine further and held that resident taxpayers of the Town of Canute were not barred from bringing the action on behalf of the town when the town officials refused to do so. *Id.*

HTB and *Shones* together make clear that a municipal corporation is entitled to avoid the bar of the statute of limitation if it sues in its "sovereign capacity" in an appropriate case. In determining in the present case whether the Town of Cyril is suing in its sovereign capacity, it is irrelevant that the "operation of a waterworks is a proprietary function . . . the character of the plaintiff's function does not control." *HTB*, 769 P.2d 134-35 (citations omitted). Instead, the focus should be upon the "ultimate right at issue." *Id.* at 134. The question is whether failing to enforce the right " 'affects public as distinguished from private enterprise.' " *Id.* at 135 (quoting *State ex rel. Land Commissioners v. Hall*, 128 P.2d 838 (1942)).

In *HTB*, the plaintiffs brought an action for damages allegedly caused by "defendants' negligent design and construction of part of a municipal water system." 769 P.2d at 132. The Oklahoma Supreme Court stated that "[w]e find it inconceivable that the rights at issue could be anything but public rights. . . . Water is fundamental to existence. This necessity entitles the general public to expect an adequate water supply. . . . " *Id.* at 136.

Based on *HTB* and *Shones*, we are convinced the Oklahoma Supreme Court would hold that the Town of Cyril acted in a sovereign capacity to protect public rights in bringing this action for contamination of the municipal

water supply. The statute of limitations therefore does not apply to bar the action.[4]

Accordingly, we REVERSE the judgment of the district court and REMAND for further proceedings.[5]

---

[4] Because we hold that the statute of limitations does not run against the Town of Cyril, we need not address when the town's cause of action accrued or reach the other issues raised on appeal by the parties.

[5] Defendant Mobil Oil Corporation's motion to file a supplemental brief is denied.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOWN OF CYRIL, a municipal corporation,	)	
Plaintiff - Appellant,	)	No. 92-6373
v.	)	(D.C. #CIV-91-792-R)
MOBIL OIL CORPORATION, a New York corporation; UNION TEXAS PETROLEUM CORPORATION, a Delaware corporation,	)	
Defendants - Appellees.	)	

ORDER
Entered February 7, 1994

Before SEYMOUR, Chief Judge, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges.

This matter comes on for consideration of appellees', Mobil Oil and Union Texas Petroleum Corporation, petitions for rehearing and suggestions for rehearing in banc.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestions for rehearing in banc were transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing in banc are denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TOWN OF CYRIL, a municipal corporation, Plaintiff, v. MOBIL OIL CORPORATION, a New York corporation; CITATION OIL AND GAS CORP., a Delaware corporation; CITATION 1989 INVESTMENT LIMITED PARTNERSHIP, a Texas limited partnership; and UNION TEXAS PETROLEUM CORPORATION, a Delaware corporation, Defendants.	)	CIV-91-702-R (Filed APR 30 1992)

ORDER

Before the Court are the Defendant, Mobil Oil Corporation's Motion for Summary Judgment and Motion to Dismiss, and the Motion of Defendants, Citation Oil and Gas Corporation and Citation 1989 Investment Limited Partnership for an Order Determining Real Parties in Interest. The Motions have been fully briefed, the Court has heard oral argument, and has taken the matter under advisement.

I.

The Plaintiff, Town of Cyril ("Cyril"), is an Oklahoma municipality located in Caddo County, Oklahoma. In

approximately 1923, Cyril began using well water as its municipal water source, serving residents of Cyril and the surrounding community. By that time, oil and gas were being produced in the location where Cyril's water wells were to be drilled; an area known as the West Cement Field. In the West Cement Field, groundwater is known to flow in a south/southwesterly direction. From 1920 until at least 1955, saltwater produced in the West Cement Field oil operations was disposed of in large unlined saltwater disposal pits, which allowed the saltwater to seep into the groundwaters. There is no natural barrier to prevent chloride from the discarded saltwater from leaching into the groundwaters beneath the surface. The process of leaching chlorides may continue for many years, and may be continuing at this time.

The contamination of Cyril's wells began at the northernmost wells, then spread and migrated in a southerly direction. As the contamination migrated south, Cyril drilled its wells further south. Cyril abandoned seven wells due to chloride contamination between 1948 and 1990.

By the late 1940's town officials had complained to the Oklahoma Planning and Resources Board ("Board") about the chloride contamination of Cyril's water wells from oil and gas operations. The Board asked area oil and gas operators to cease disposing of saltwater in the vicinity of Cyril's wells.

By 1951, Cyril again complained to the Oklahoma Planning and Resources Board about chloride contamination of the Town's water wells. The Board and other state agencies conducted an investigation, and confirmed that

the source of pollution was the oilfield saltwater disposal pits. In 1952, the Board again asked oil and gas operators to cease saltwater disposal in the area. Cyril had abandoned three of its water wells by that time.

By 1966, Cyril was sampling and monitoring its water wells for chloride contamination. Cyril used five water wells for its municipal supply at that time. Within a few years, the chloride level in four of those five wells exceeded the legal drinking water standard for municipal water supplies. By 1985, the fifth well also was contaminated with chloride.

In 1980, Cyril obtained the right to extract water from additional wells located further south. By 1985, another water well was contaminated with chloride. Cyril completed its newest well in 1987. By June, 1989, it too showed elevated chloride levels. On July 18, 1989, Cyril contacted the Oklahoma Corporation Commission and other state agencies concerning the elevated chloride levels in its water supply. On October 10, 1989, Cyril entered into a Consent Order wherein the Oklahoma State Department of Health required Cyril to obtain a new municipal water supply.

II.

In support of its Motion for Summary Judgment, Mobil first contends that Cyril's claims are barred by the applicable statute of limitations. Cyril argues that its claims are not subject to the statute of limitations because its claims are based, in part, on a nuisance theory. Cyril cites Title 50, Okla. Stat. § 7, which provides that "[n]o lapse of time can legalize a public nuisance amounting to

an actual obstruction of public right." Cyril interprets this statute too broadly. Section 7 of Title 50 does not suspend the operation of the statute of limitations on a claim for damages caused by a public nuisance which obstructs a public right for as long as the nuisance exists. *See Ruminer v. Ouantty,* 198 Okla. 395, 179 P.2d 164, 166 (1947); *Revard v. Hunt,* 29 Okla. 835, 119 P. 589, 592 (1911). It merely allows abatement or a civil action therefor as long as the nuisance exists. *Id.* In this case, Cyril makes no claim for abatement; but seeks only monetary damages. Cyril's claim for money damages is not saved by the statute.

Cyril brought its initial Complaint against Mobil on September 13, 1990.[1] Thus, any cause of action which accrued prior to September 13, 1988 is barred by Oklahoma's two-year statute of limitations. Title 12 Okla. Stat. § 95 Third; *Arkansas Fuel Oil Co. v. City of Blackwell,* 87 F.2d 50 (10th Cir. 1937). Under Oklahoma law, Cyril's cause of action accrued at the time when Cyril first learned that the Defendants' oilfield saltwater operations had contaminated the groundwater to such a degree as to permanently damage its water supply. *Arkansas Fuel Oil Co. v. City of Blackwell,* 87 F.2d 50 (10th Cir. 1937).

The Court rejects the notion that Cyril's cause of action did not accrue until Cyril entered into the consent order with the Oklahoma Department of Public Health which ordered Cyril to cease using its groundwater supply. By that time, the Town of Cyril had known about the contamination and the cause thereof for decades, and its

---

[1] Cyril ultimately dismissed its original Complaint without prejudice. Cyril then refiled within the one-year period provided by Oklahoma's savings statute.

claims were already barred. Cyril's cause of action accrued when it learned that its groundwater was permanently damaged; not decades later when the Town was ordered to cease using it as a water supply. *Arkansas Fuel Oil Co., supra.*

Cyril's counsel has represented to the Court that the Defendants' acts of pollution ceased, at the latest, some time in 1987. Cyril does not contend that the Defendants' saltwater disposal or waterflood operations are continuing at this time, or that they continued into the limitation period. Although a continuing, abatable nuisance gives rise over and over to causes of action for damages sustained within the limitation period immediately prior to suit; *Branch v. Mobil Oil Corp.*, CIV-90-723 (W.D. Okla. Order of December 10, 1991), *citing Haenchen v. Sand Products Co.*, 626 P.2d 332, 334 (Okla. App. 1981); and *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1005 (D. Kan. 1984), *affd* 858 F.2d 1449 (10th Cir. 1988); no continuing abatable nuisance is alleged in this case. Cyril does not contend that the nuisance it alleges is abatable, or that it is temporary in nature. The undisputed evidence shows that Cyril's water source was permanently damaged more than two years prior to bringing suit by oilfield operations which ceased more than two years prior to bringing suit.

Cyril also claims that Mobil's (more recent) waterflood operations and not merely the Defendants' decades-old saltwater disposal pits, caused the pollution of its two newest water wells. This argument fails because Cyril has offered no evidence of the dates on which Mobil's waterflood operations began and ceased. In light of the admission by Cyril's counsel in oral argument that the last

tortious conduct was committed no later than some unspecified date in 1987, the Court cannot infer that any tortious conduct occurred within the limitation period. Cyril has offered no evidence which would enable a reasonable factfinder to conclude that the torts alleged were committed within or discovered within the limitation period.

Cyril also represents to the Court that it has learned since the filing of its Complaint that its two newest wells, the C-1 and C-3 wells, were completed in the deeper, Marlow Formation, rather than in the Rush Springs Aquifer, in which its earlier wells were completed. Cyril relies on expert testimony indicating that there is an impermeable layer of shale between the Morrow and Rush Springs aquifers. Based on this evidence Cyril seeks to apply the discovery rule, on the theory that it did not discover the damage to the Marlow formation until it heard the opinion of this expert witness during the course of the litigation. Also based on this evidence, Cyril argues that the pollution of the C-1 and C-3 wells was caused by some conduct other than the ancient disposal of saltwater in unlined pits, presumably the waterflood operations previously mentioned.

Cyril's discovery rule argument is without merit. Even though Cyril may not have fully appreciated the extent to which the saltwater had contaminated the groundwaters underlying its water leases, and even though it may not have known which specific formations were affected, Cyril's cause of action accrued when its officials knew, or with reasonable diligence should have known, that the groundwaters had sustained permanent damage. *Arkansas Fuel Oil Co., supra.*

The undisputed evidence shows that Cyril discovered more than two years before September 13, 1990 that the groundwaters underlying the West Cement Field were contaminated with chlorides from the use of saltwater in the Defendants' oil and gas operations. Officials of the Town of Cyril knew of the existence and source of the pollution, and knew that the plume of pollution was spreading by the early 1950s. Water tests conducted in 1985 showed that the chloride level in Cyril's C-1 well was over ten times its natural background level. In light of this test data, and in the exercise of reasonable diligence, the Town of Cyril should have discovered that the groundwaters in the Marlow formation underlying the West Cement field were contaminated. Cyril's cause of action accrued when it became obvious to town officials that it had suffered a permanent injury. *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50 (10th Cir. 1931). The critical time is not when the migrating plume of saltwater reached each well as the town continued to drill wells further and further south. The critical date was that on which the Town of Cyril learned that the saltwater contamination had reached the groundwater in such quantities as permanently to ruin its water supply. *Arkansas Fuel Oil Co., supra.*

Cyril also argues that the alleged existence of an impermeable layer of shale between the Rush Springs and Marlow aquifers proves that the Defendants' past use of saltwater disposal pits is not the proximate cause of the loss of the C-1 and C-3 wells. Cyril suggests that some more recent conduct must have caused the pollution of the C-1 and C-3 wells. The same expert hydrologist who testified about the layer of shale also testified "[T]here is

a contact of the Rush Springs with the Marlow, and there may be some right up to contact. The head differential is to the Marlow from the Rush Springs. If there is a sand lens in the Marlow, there may be contact." This evidence raises the inference that the pollution of the Marlow aquifer may have been caused by some activity other than the saltwater disposal operations, but does not raise the inference that the pollution of the Marlow aquifer was caused by any activity which occurred within the limitation period. Cyril offers no evidence of any more recent conduct by the Defendants which could have caused the pollution of the C-1 and C-3 wells, and concedes that the latest date on which any tortious conduct occurred was some time in 1987. The undisputed evidence shows that the C-1 well was contaminated by 1985, some three years prior to the limitation period. Although the C-3 well was not drilled until 1987, the groundwaters in the area were contaminated long before it was drilled. Town officials knew of the existence and cause of the plume of chloride contamination in the area long before the C-1 and C-3 wells were drilled. Having lost eight earlier wells, Town officials were well aware of the path of migration of the chloride. With the exercise of reasonable diligence, the contamination of the waters underlying the C-3 well would have been discovered more than two years prior to filing suit.

Cyril also cites *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988) as a basis for avoiding the statute of limitations. In *HTB*, the Oklahoma City Municipal Authority, the Oklahoma City Municipal Facilities Authority, and the City of Oklahoma

City sued an architecture firm for damages for the negligent design and construction of a municipal water pipeline. The municipal authorities were public trusts created pursuant to statute,[2] and the City was the beneficiary of those trusts. The defendant argued that the plaintiffs' claims were barred by the statute of limitations. The Oklahoma Supreme Court held that the trust plaintiffs were acting in a sovereign capacity to protect vested public rights, and that, therefore, their claims were not subject to the statute of limitations. 769 P.2d 134-135. The Court's decision turned upon the fact that the trust plaintiffs were functioning as agencies of the state under Title 60 Okla. Stat. § 179. *Id.*

This case was not brought by the Cyril Municipal Authority, or by any trust acting in a sovereign capacity as an agency of the state. The Town of Cyril is not sovereign, is not acting in a sovereign capacity, and is not an agency of the state.

Cyril seeks to have the Cyril Municipal Authority joined as a party to this lawsuit. The Town of Cyril, and not the Cyril Municipal Authority, holds the easements and the leases which entitle the Town of produce and take water from the wells. Thus it seems clear that any claim for damages to the rights secured by the easements and leases would belong to the Town of Cyril, and not the Municipal Authority. Nevertheless, the Town of Cyril

---

[2] Title 60 Okla. Stat. § 179 provides:

> The trustee . . . shall be an agency of the State and the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created. . . .

maintains that the Municipal Authority is a real party in interest in this litigation because the Municipal Authority is a party to the new water purchase contract with the Rural Water District. Assuming that the Municipal Authority is a real party in interest, joinder at this late date would not save the Town's stale claims. The Cyril Municipal Authority was not even created until 1980, and did not exercise any authority over the Town's water supply until it entered into the water purchase contract on May 17, 1990. By that time the statute of limitations had run on all of the claims asserted in this lawsuit.[3] The Court deems it particularly inappropriate to join the Municipal Authority at this stage of the proceedings.

III.

Since the Court has determined, as a matter of law, that the claims asserted in this litigation are barred by the statute of limitations, the Court does not reach the issue of whether the Town of Cyril is the real party in interest. The Court notes that Defendants Citation Oil & Gas Corp., Citation 1989 Investment Limited Partnership and

---

[3] The Plaintiff's claims with respect to the saltwater disposal pits accrued when it became obvious that its water supply had sustained permanent damage, and were barred two years thereafter. *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50 (10th Cir. 1931). This occurred some time in the 1950's. The last date upon which the Defendants engaged in conduct complained of in this litigation is some unspecified date in 1987. Thus, the statute of limitations had run on all of the Plaintiff's claims by the time the Cyril Municipal Authority first became involved in the subject of this lawsuit.

Union Petroleum Corporation have asserted the affirmative defense of statute of limitations in their pleadings, but have not moved for summary judgment on those grounds. All parties are hereby directed to show cause, within fifteen (15) days of the date of this Order, why the claims asserted in this litigation against Defendants Citation Oil & Gas Corp., Citation 1989 Investment Limited Partnership and Union Petroleum are not also barred by the statute of limitations.

The Motion for Summary Judgment of Defendant Mobil Oil Corporation is hereby **GRANTED.** The Motion of Defendants, Citation Oil and Gas Corp. and Citation 1989 Investment Limited Partnership for an Order Determining Real Parties in Interest, and the Motion to Dismiss of Defendant Mobil Oil Corporation are **HELD IN ABEYANCE** pending the Court's determination of the applicability of the statute of limitations to the claims asserted against those Defendants.

IT IS SO ORDERED this 30th day of April, 1992.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TOWN OF CYRIL, a municipal corporation, Plaintiff,	)	CIV-91-702-R
v.	)	(Filed Oct. 13, 1992)
MOBIL OIL CORPORATION, a New York corporation; CITATION OIL AND GAS CORP., a Delaware corporation; CITATION 1989 INVESTMENT LIMITED PARTNERSHIP, a Texas limited partnership; and UNION TEXAS PETROLEUM CORPORATION, a Delaware corporation, Defendants.	)	

ORDER

Before the Court is the Plaintiff's Motion to Reconsider the Court's Order granting summary judgment to Defendant Mobil Oil Corporation. Also at issue is Defendant Union Texas Petroleum Corporation's contention that the Plaintiff's claims against it are barred by the statute of limitations.

The Plaintiff now asserts that its previous interpretation of *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1989) was "erroneous." Plaintiff now characterizes *HTB* as having "evolved" from the case of *Foote v. Town of Watonga*, 37 Okla. 43, 130 P. 597 (1913), and interprets these cases as conferring

upon it sovereign immunity from the statute of limitations. The Plaintiff reads these cases too broadly.

In *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1989), the plaintiffs sued an architecture firm for money damages for the alleged negligent design and construction of a municipal water pipeline. The trial court found the claims to be stale and granted summary judgment on statute of limitations grounds. The Oklahoma Court of Appeals affirmed, and the Supreme Court reversed. The Oklahoma Supreme Court held that a municipal improvement authority which was, by statute, treated as an agency of the state, was not subject to statutes of limitation. The long settled rule in Oklahoma (and in most jurisdictions) is that the *state* is sovereign and thus immune from statutes of limitation. Until the Supreme Court's ruling in *HTB, supra*, this form of sovereign immunity had not been applied to cities, towns or other inferior political subdivisions. *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d at 138-139 (J. Opala dissenting); *citing Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 10 S.Ct. 19, 22-23, 33 L.Ed.2d 231 (1889); and *Reynolds v. Sims*, 377 U.S. 533, 575, 84 S.Ct. 1362, 1388, 12 L.Ed.2d 506 (1964). In finding that the municipal authorities were entitled to sovereign immunity, the Supreme Court cited *Foote v. Town of Watonga*, 37 Okla. 43, 130 P. 597 (1913) for "the general rule that statutes of limitation do not apply to a government entity seeking in its sovereign capacity to vindicate public rights, and that the maxium (sic) '*nullum tempus occurrit regi*' is not restricted in its application to sovereign states or governments, but that its application extends to and includes public rights of all kinds, and

that it applies to municipal corporations as trustees of the rights of the public. . . . " 769 P.2d at 133, *citing Foot (sic) v. Town of Watonga*, 37 Okla. 43, 130 P. 597, 598 (1913).

The Supreme Court's interpretation of *Foote* is expansive. In *Foote*, supra, an individual plaintiff wrongfully occupied and erected improvements upon a lot of land to which the Town of Watonga held title for the benefit of the public. The plaintiff brought a quiet title suit against another individual who apparently claimed some interest in the property. The Town of Watonga was joined as a party defendant. The Supreme Court of Oklahoma held that the equitable doctrine of estoppel in pais would not operate against the Town of Watonga, and further, that the statute of limitations did not bar the Town from defending the plaintiff's claims of adverse possession with respect to property held by the municipality for the use and benefit of the public. *Foote* did not involve the application of the statute of limitations to tort claims for money damages. *Foote*, 37 Okla. 43, 130 P. 597.

This Court interprets *HTB* as establishing a new rule of sovereign immunity from limitations for towns and other inferior governmental entities, applicable only where they sue in a sovereign capacity, *and* assert public rights. The *HTB* Court treated the elements of sovereign capacity and public rights as distinct concepts to be analyzed separately, each of which is required in order to assert sovereign immunity from limitations. The municipal authority Plaintiffs in *HTB* were public trusts created pursuant to state statute, with the City as their beneficiary. The Supreme Court noted that the statute which authorizes the creation of municipal trust authorities, Title 60 Okla. Stat. § 179 provides that the "trustee, or

trustees under [a municipal trust] shall be an agency of the state . . . ," and that dissolution of the trust requires approval of the governor. From this, the Court concluded that the trusts were acting in a sovereign capacity; the Court then found that the claims for damages to the City's water pipeline system involved public rights. The Court held that the municipal trusts were immune from the statute of limitations because they were 1) acting in a sovereign capacity, and 2) asserting a public right. *HTB*, 769 P.2d at 134.[1]

Regardless of whether the right asserted in this case is a public right, the Court is convinced that the Plaintiff town is not bringing this suit in a sovereign capacity. Though the *HTB* court did not establish clear criteria for determining when a political subdivision might be acting in a sovereign capacity, it found the municipal trust plaintiffs to be acting in a sovereign capacity because they were, by law, regarded as agencies of the state.[2] The *HTB*

---

[1] "In applying [the doctrine of sovereign immunity] to the issue presently before us, we must determine whether Plaintiffs below acted in a sovereign capacity, *and* whether the rights at issue use to the level of public rights." [Emphasis added]"

[2] The Court notes that in *HTB*, the Oklahoma Supreme Court held all the plaintiffs immune from statute of limitations, including those of the City. This Court does not interpret that holding as a finding that the City was acting in a sovereign capacity, or that the City, acting alone, would have been entitled to immunity. Rather, the Supreme Court noted that the City was the beneficiary of the municipal trusts. It appears that the City's claims were preserved because they were asserted for the City's benefit by the trusts.

court's strong reliance on the statutory conferral of sovereignty strongly implies that a mere unsupported assertion of sovereignty is not enough. The Plaintiff Town of Cyril cites no statute or other authority supporting its claim of sovereign capacity in this case. The Court finds that the Plaintiff town has not satisfied the two-part test adopted in *HTB* and is therefore not immune from the applicable statute of limitations.

The Plaintiff has provided no new facts or law which would warrant reconsideration of the Court's earlier order granting summary judgment in favor of Defendant Mobil Oil Corporation on statute of limitations grounds. Moreover, the Court is convinced that the statute of limitations also bars the Plaintiff's claims against Defendant Union Texas Petroleum Corporation. The Plaintiff offers no further evidence or authorities in response to the Court's Order directing the parties to show cause why the statute of limitations defense would not bar the Plaintiff's claims against Union Texas.

The Plaintiff's Motion to Reconsider is hereby **DENIED.** The Court hereby **GRANTS** summary judgment in favor of Defendant Union Texas Petroleum Corporation.

IT IS SO ORDERED this 13th day of October, 1992.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 10-13-92

STATUTORY PROVISIONS INVOLVED

Section 92 of Title 12, Okla. Stat. (1991), states:

> Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation.

Section 95 (Third) of Title 12, Okla. Stat. (1991), provides in pertinent part:

> Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> Third. Within two (2) years: An action for trespass upon real property; . . . .

Section 37-115 of Title 11, Okla. Stat. (1991), provides in pertinent part:

> No person, firm, partnership, or corporation, . . . shall pollute or permit the pollution of the water supply of a municipality, or any stream, pond, spring, lake, or other water reservoir or groundwater aquifer, which is used or which is being held for use as a water supply by a municipality. . . .

Section 37-116 of Title 11, Okla. Stat. (1991), provides:

> A municipality shall have a right of action for damages resulting from pollution of its water supply, as provided in Section 37-115 of this title, and the measure of damages shall be the amount which will compensate for the detriment caused thereby, whether it could have

been anticipated or not. Where such pollution is continued for a period of six (6) months or more, the injury shall be regarded as permanent.

Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1755

In The

Supreme Court of the United States

October Term, 1993

MOBIL OIL CORPORATION,

Petitioner,

v.

TOWN OF CYRIL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

D. CRAIG SHEW
Counsel of Record
and
MICHAEL G. SMITH
JAMES R. SCRIVNER
THE LAW OFFICE OF
SMITH, SHEW & SCRIVNER, P.C.
P. O. Box 1373
Ada, OK 74820
(405) 332-9033

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Cyril's C-1/C-3 cause of action accrued on October 10, 1989.

2. Whether the function performed by a municipal corporation is relevant to the determination of sovereign capacity as it applies to the *nullum tempus* doctrine.

3. Whether the Tenth Circuit abused its discretion by not certifying the immunity from limitations issue to the Oklahoma Supreme Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

ARGUMENT 5

I. CYRIL'S C-1/C-3 CAUSE OF ACTION FIRST ACCRUED, AND THUS ITS STATUTE OF LIMITATIONS FIRST BEGAN TO RUN, ON OCTOBER 10, 1989 5

A. Cyril's C-1/C-3 Cause of Action First Accrued When It First Sustained A Permanent Injury To Its C-1 and C-3 Wells 6

B. There Is No Causal Connection Between The Pollution Of The AB Wells and the Loss of the C Wells 10

II. THE COURT OF APPEALS' FINDING THAT THE *NULLUM TEMPUS* DOCTRINE IS APPLICABLE TO THE TOWN OF CYRIL IS CONSISTENT WITH OKLAHOMA PRECEDENT 11

A. *Metropolitan Railroad* Has No Application To The Town of Cyril 11

B. The *Nullum Tempus* Doctrine Applies to Municipal Corporations in Oklahoma 12

C. The Municipality's Dual Capacity or Function Performed Is Irrelevant To Sovereign Capacity 14

TABLE OF CONTENTS – Continued

Page

III. THERE IS NO REASONABLE BASIS FOR CERTIFYING THE ISSUE OF IMMUNITY FROM LIMITATIONS TO THE OKLAHOMA SUPREME COURT 17

A. The Issue of Certification Was Not Properly Preserved Below 17

B. Application of the *Nullum Tempus* Rule to the Cyril Facts Is Not A Close Question .. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Arkansas Fuel Oil Co. v. City of Blackwell, 87 F.2d 50 (10th Cir. 1936) 6, 9, 19

Cities Service Gas Co. v. Eggers, 186 Okla. 466, 98 P.2d 1114 (1940) 9

Collis v. Ashland Oil and Refining Company, 722 F.2d 625 (10th Cir. 1983) 9

Foote v. Town of Watonga, 37 Okla. 43, 130 P. 597 (1913) 13

Haring v. Prosise, 462 U.S. 306 (1983) 21

Harmon v. Harmon, 527 P.2d 610 (Okla. App. 1974) 7

Harper-Turner Oil Co. v. Bridge, 311 P.2d 947 (Okla. 1957) 6

Herndon v. Board of Com'rs in and for Pontotoc County, 158 Okla. 14, 11 P.2d 939 (1939) 13

In the Matter of the Guardianship of Randall, 569 P.2d 549 (Okla. App. 1977) 8

Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1 (1889) 11, 12

Miller v. Cudahy Company, 567 F.Supp. 892 (D. Kan. 1983) 7, 8, 9

Miree v. DeKalb County, Ga., 433 U.S. 25 (1977) 18

Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurants, Inc., 669 P.2d 265 (Okla. 1983) 8

TABLE OF AUTHORITIES – Continued

Page

Oklahoma City Municipal Improvement Authority v. HTB, Inc., 769 P.2d 131 (Okla. 1989) 13, 14, 15, 16, 17, 20

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 21

Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1937) 11

Shell Petroleum Corp. v. Town of Fairfax, 180 Okla. 326, 69 P.2d 649 (1937) 19

Sherwood Forest No. 2 Corp. v. City of Norman, 633 P.2d 368 (Okla. 1980) 7

State ex rel. Schones v. Town of Canute, 858 P.2d 436 (Okla. 1993) 14, 17, 20

State of Oklahoma ex rel. Jan Eric Cartwright v. Tidmore, 674 P.2d 14 (Okla. 1983) 13

Town of Cyril v. Mobil Oil Corporation, 11 F.3d 996 (10th Cir. 1994) 6, 19

Von Stilli v. Young, 203 Okla. 86, 219 P.2d 224 (1950) 19

STATUTES AND RULES

Okla. Stat. Ann tit. 11, §37-115 (West Supp. 1994) .. 1, 12

Okla. Stat. Ann tit. 11, §37-116 (West 1978) 1, 12

Okla. Stat. Ann tit. 27A, §2-6-101(16) (West Supp. 1994) 2, 12

Okla. Stat. Ann tit. 27A, §2-6-102 (West Supp. 1994) 2, 12

STATUTORY PROVISIONS

The provisions of Okla. Stat. Ann. tit. 11, §37-115 (West Supp. 1994), are as follows:

> No person, firm, partnership, or corporation, or any of the partners, officers, managers, or employees thereof, shall pollute or permit the pollution of the water supply of a municipality, or any stream, pond, spring, lake,, or other water reservoir or groundwater aquifer, which is used or which is being held for use as a water supply by a municipality. A municipality may bring an action in the district court to enjoin any activity that will cause pollution of the water supply of a municipality whether or not such activity is regulated, licensed, or inspected. For the purposes of this section, the term pollution means contamination or other alteration of the physical, chemical, or biological properties of any natural waters of the state, or such discharge of any liquid, gaseous, or solid substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to the health, safety, or welfare of the general public, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, or fish or other aquatic life.

The provisions of Okla. Stat. Ann. tit. 11, §37-116 (West 1978), are as follows:

> A municipality shall have a right of action for damages resulting from pollution of its water supply, as provided in Section 37-115 of this title, and the measure of damages shall be the

> amount which will compensate for the detriment caused thereby, whether it could have been anticipated or not. Where such pollution is continued for a period of six (6) months or more, the injury shall be regarded as permanent.

The provisions of Okla. Stat. Ann. tit. 27A, §2 6-101(16) (West Supp. 1994), are as follows:

> 'Waters of the state' means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof, and shall include under all circumstances the water of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof;

The provisions of Okla. Stat. Ann. tit. 27A, §2-6-102 (West Supp. 1994), are as follows:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution of this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic,

agricultural, industrial, recreational and other legitimate beneficial uses; to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives.

STATEMENT OF THE CASE

Respondent, Town of Cyril[1] ("Cyril"), has utilized groundwater as its municipal water supply source for many years. For some years prior to 1948, Cyril obtained groundwater from its AB, AB-1, and AB-2 wells (collectively referred to as the "AB" wells) located near the east boundary of the NE/4 of Section 1.[2] R. Aplt. App.[3] at 60. During the period from 1948 to 1952, Cyril was forced to abandon the AB wells due to chloride pollution resulting

---

[1] Pursuant to Rule 29.1, the Town of Cyril is a municipal corporation, but it has no parent companies or subsidiaries.

[2] For the Court's convenience, a well location map is included at App. 1. R. Aplt. App. at 70, 72, and 182.

[3] References to the Record below are cited as "R. Aplt. App." References to the appendix herein are designated by "App.", and citations to Petitioner's appendix are designated by "Petition App."

from the use of saltwater disposal pits associated with area oil and gas operations. *Id.* at 61-62.

After the loss of its AB wells in the NE/4 of Section 1, Cyril began obtaining groundwater from the A-1, A-2, A-3, A-4, and A-5 wells (collectively referred to as the "A" wells) located in the SE/4 of Section 1. *See*, App. 1. These wells all began to have elevated chloride levels[4] by 1966, and by 1975 all of the A wells, except A-4, had been abandoned because the chloride levels exceeded the 250 ppm standard set for public drinking water supplies. *Id.* at 62 and 71.

In December of 1980, Cyril obtained the water rights to 157 acres located in the NW/4 of Section 7 and drilled its C-1 well to a depth of 383 feet. *Id.* at 62, 122, and 138. Initially, the chloride concentration of 12 ppm at C-1 was well within the background range, but it gradually increased to 262 ppm by June of 1990. *Id.* at 72. Likewise, in March of 1986, Cyril obtained the water rights to 80 acres located in the W/2 of the NE/4 of Section 12 and drilled its C-3 well to a depth of 430 feet. *Id.* at 121 and 162. Although no chloride values were initially available at the time the C-3 well was drilled, the 1989 value of 20 ppm was still at the background level. *Id.* at 72.

In July of 1989, the Oklahoma State Department of Health undertook an investigation of Cyril's water supply. It was determined that because Cyril's C-1 and C-3 wells had experienced increased saltwater contamination

---

[4] One way of measuring and expressing chloride concentration is "parts per million" (ppm). Natural background chloride levels in the subject area are in the 12 – 25 ppm range.

and were likely to be unusable in the future, an alternate source of supply was needed to safeguard the public health due to the likelihood of the complete loss of the present source. As a result, on October 10, 1989, Cyril was required by the Department of Health to obtain a new source of water supply to serve its residents. *Id.* at 112. Consequently, Cyril began purchasing its water at a cost which substantially exceeded its previous production costs and which resulted in substantial water rate increases for its residents.[5] *Id.* at 103. Because of the loss of its C-1 and C-3 wells, Cyril commenced the present action seeking compensation to offset the water rate increases for the benefit of itself and its residents. *Id.* at 1.

ARGUMENT

I. CYRIL'S C-1/C-3 CAUSE OF ACTION FIRST ACCRUED, AND THUS ITS STATUTE OF LIMITATIONS FIRST BEGAN TO RUN, ON OCTOBER 10, 1989.

Petitioner, Mobil Oil Corporation ("Mobil"), opens its "Reasons for Granting the Petition," and reiterates elsewhere, with the statement that Cyril filed suit more than *40 years* after its cause of action accrued. Petition at 6, 8, and 24. While such an unqualified statement is undoubtedly intended to invoke the sympathy of the Court, it is grossly misleading because Mobil fails to advise the Court that when Cyril's C-1/C-3 cause of action accrued

[5] Depending upon the amount of water used, the rate increases for Cyril's residents varied between 400 and 500 percent.

is a sharply contested issue. That was the primary issue on appeal, but since the Tenth Circuit held that the *nullum tempus* doctrine was applicable to the Cyril facts, it did not address when Cyril's C-1/C-3 cause of action accrued. *Town of Cyril v. Mobil Oil Corporation*, 11 F.3d 996, 998 n.5 (10th Cir. 1994). Had it done so, the Tenth Circuit would have easily concluded, based on the most fundamental of legal principles, that Cyril's C-1/C-3 cause of action first accrued on October 10, 1989.

A. Cyril's C-1/C-3 Cause of Action First Accrued When It First Sustained A Permanent Injury To Its C-1 and C-3 Wells.

The Cyril trial court ruled that Cyril's cause of action accrued when Cyril first learned that its water supply had sustained permanent damage. R. Aplt. App. at 299, *passim*. Although the trial court did not offer a specific date, presumably the accrual time corresponds to the period of time when Cyril was forced to abandon its AB wells (AB and AB-1 in 1948 and AB-2 in 1952) as the trial court specifically mentions the early 1950s and points out the statute of limitations had run decades prior to 1989 when Cyril was ordered to cease using its C-1 and C-3 wells. R. Aplt. App. at 305 and 308. There is no dispute that Cyril's AB causes of action accrued in the late 1940s and early 1950s because it was during that period that the AB wells sustained a permanent injury.[6] However, Cyril's

---

[6] Like most other pollution injuries, a cause of action does not accrue until a groundwater injury becomes permanent. *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50, 52 (10th Cir. 1936); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 949 (Okla. 1957).

present claims are not based on the loss of its AB wells. Its cause of action is based on, and limited to, the loss of its C-1 and C-3 wells which involve totally separate and distinct water rights.

Since there is no evidence that the AB pollution in late 1940s and early 1950s extended beyond the AB well locations, the trial court's ruling leads to the absurd result that requires every landowner who might suffer a future injury to his water rights to file his action in 1948 at the time of the first permanent injury to the aquifer. Moreover, this result obtains regardless of how distant the landowner might be from the initial pollution site, regardless of the rate of groundwater/pollution movement,[7] and regardless of whether the landowner has sustained a presently-existing injury to his water rights.

It is well settled that a plaintiff's statute of limitations begins to run when his cause of action accrues, and the cause of action accrues when plaintiff first could have maintained his action to a successful conclusion. *Sherwood Forest No. 2 Corp. v. City of Norman*, 633 P.2d 368, 370 (Okla. 1980). It is equally well settled that without a presently-existing injury, a plaintiff has no cause of action. *Miller v. Cudahy Company*, 567 F.Supp. 892, 897-98 (D. Kan. 1983); *Harmon v. Harmon*, 527 P.2d 610, 613 (Okla. App. 1974) (a plaintiff has no actionable cause until damage has been sustained). If the trial court is indeed correct in ruling that Cyril's cause of action accrued in the 1950s, then it must necessarily follow that Cyril would have

---

[7] In the present case, the rate of groundwater/pollution movement is estimated to be about 120 feet per year.

been obligated to bring and then successfully maintain its C-1/C-3 cause of action in the early 1950s. But in the 1950s Cyril neither owned the water rights on which its C-1/C-3 claims are based[8] nor was there any injury whatsoever to either the C-1 or C-3 well locations at that point in time. Therefore, absent these essential elements, Cyril could not have successfully maintained a C-1/C-3 cause of action at the time the trial court found its statute of limitations began to run.

Had Cyril filed its present action in the 1950s as the trial court suggests, it would have found itself in the same predicament as that of some of the *Miller* plaintiffs – without a presently-existing injury, there is no cause of action. *Miller,* 567 F.Supp. at 897-98. Plaintiffs in *Miller* were landowners and lessees who brought an action alleging that defendants' long-time salt manufacturing operation had polluted their groundwater by creating a large saltwater plume underlying their property. *Id.* at 894. Some of the plaintiffs had property clearly within the plume area, others were partially within the plume area, while still others were just beyond the leading edge of the slowly-moving plume of saltwater pollution. *Id.* at 897.

---

[8] Cyril acquired the C-1 water rights in December of 1980 and the C-3 water rights in March of 1986. R. Aplt. App. at 122 and 121. Prior to those times, Cyril did not own the legal right to bring its present cause of action because it did not have any interest in these property rights. *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurants, Inc.*, 669 P.2d 265, 268 (Okla. 1983); *In the matter of the Guardianship of Randall,* 569 P.2d 549, 551 (Okla. App. 1977) (a party must assert his own legal rights and interests and cannot rest his claim to relief on rights or interests of third parties).

Defendant moved for summary judgment as to those plaintiffs whose property was beyond the leading edge of the plume and whose property had not yet sustained an injury. These "prospective" plaintiffs argued that although the leading edge of the heavily-polluted saltwater plume had not yet reached their property lines, it was certain to do so in the near future and thus, they were entitled to reduce their future claims to a present claim for damages. The *Miller* court disagreed and held that even though these properties may be damaged in the future, since there was no evidence of a presently-existing injury to these plaintiffs' property rights, defendant was entitled to summary judgment because there was no triable issue of fact.[9] *Id.* at 898.

It is readily apparent that if Cyril's C-1/C-3 cause of action accrued decades ago, Cyril should have filed its present action decades ago. Had Cyril, or more properly the owners of the C-1 and C-3 water rights at that time, done so, it would have been in precisely the same position as the *Miller* plaintiffs who were dismissed because they had not yet sustained an injury. Even assuming Cyril knew unequivocally that the pollution would reach these well locations, like the dismissed *Miller* plaintiffs, Cyril had no C-1/C-3 cause of action in the 1950s because it sustained no permanent injury until October of 1989 when the Department of Health ordered Cyril to abandon its C-1 and C-3 wells.

---

[9] Oklahoma law is consistent with the black letter law of *Miller*. *See, e.g., Collis v. Ashland Oil and Refining Company*, 722 F.2d 625 (10th Cir. 1983); *Arkansas Fuel*, 87 F.2d 50; *Cities Service Gas Co. v. Eggers*, 186 Okla. 466, 98 P.2d 1114, Syll. 12 (1940).

B. There Is No Causal Connection Between The Pollution Of The AB Wells and the Loss of the C Wells.

In its Complaint, Cyril alleged that the Rush Springs Aquifer was the source of its water supply for its C-1 and C-3 wells. R. Aplt. App. at 6. Since that time, however, extensive field work carried out on behalf of Mobil has revealed that there is an impermeable shale barrier underlying the Rush Springs Aquifer at about 100 feet below land surface. *Id.* at 185-192. If Mobil's expert is indeed correct about the impermeability of this shale barrier, then whatever early pollution had reached the Rush Springs Aquifer and caused the loss of Cyril's AB wells will remain confined in the Rush Springs Aquifer because the impermeable shale barrier effectively precludes movement of the pollution into the underlying Marlow Formation from which Cyril's C-1 and C-3 wells draw their water. *Id.* Thus, to the extent that Cyril's AB wells became polluted from saltwater disposal pits and the pollution is precluded from moving vertically through the impermeable barrier at 100 feet, then the initial loss of Cyril's AB wells cannot trigger the statute of limitations with respect to the loss of Cyril's deeper C-1 and C-3 wells because there is no causal connection between the loss of the AB and C wells.

II. THE COURT OF APPEALS' FINDING THAT THE *NULLUM TEMPUS* DOCTRINE IS APPLICABLE TO THE TOWN OF CYRIL IS CONSISTENT WITH OKLAHOMA PRECEDENT.

A. *Metropolitan Railroad* Has No Application To The Town of Cyril.

Apparently, Mobil cites *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889) for the proposition that the *nullum tempus* doctrine does not apply to an assumpsit action in the District of Columbia in the late 1800s. Aside from being one hundred years later, the law in the District of Columbia is quite different from the law in Oklahoma. Consequently, a conflict over a question controlled by state law (or law of the District of Columbia) is not a ground for granting certiorari, because such a conflict is merely corollary to a permissible difference of opinion between state courts. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1937).

In addition, Cyril is not bringing an assumpsit action. It is suing for the total destruction and loss of its municipal water supply. Cyril seeks to protect its water rights held in trust for the public, and it has long been declared public policy in Oklahoma that:

> . . . the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances . . . [and] it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies . . .

Okla. Stat. Ann. tit. 27A, §2-6-102 (West Supp. 1994). In conjunction with that policy, the Oklahoma legislature has specifically granted municipalities the right to recover damages for the pollution of a municipal water supply. *Id.* at tit. 11, §§37-116 and 37-115. (West 1978 & Supp. 1994). Since Cyril's municipal water supply comes from a groundwater source, it is by definition included as a part of the waters of the state of Oklahoma. *Id.* at tit. 27A, §2-6-101(16) (West Supp. 1994).

This is precisely the situation the *Metropolitan Railroad* Court had in mind when it conditioned the application of its ruling to public nuisances which, as the Court points out, are generally offenses against the sovereign power itself:

> What may be the rule in regard to purprestures and public nuisances, by encroachments upon the highways and other public places, it is not necessary to determine. They are generally offenses against the sovereign power itself, and, as such, no length of time can protect them. Where the right of property in such places is vested in the municipality, an assertion of that right may or may not be subject to the law of limitations. We express no opinion on that point, since it may be affected by considerations which are not involved in the present case.

Metropolitan Railroad Co., 132 U.S. at 12.

B. The *Nullum Tempus* Doctrine Applies to Municipal Corporations in Oklahoma.

Oklahoma has long recognized the doctrine of *nullum tempus occurrit regi* or time does not run against the king.

This rule was first announced in Oklahoma in *Foote v. Town of Watonga*, 37 Okla. 43, 130 P. 597 (1913), which involved the property rights of the Town of Watonga:

> The generally accepted doctrine is that the maxim, *"Nullum tempus occurrit regi," is not restricted* in its application to sovereign states or governments, *but that its application extends to and includes public rights of all kinds, and that it applies to municipal corporations as trustees of the rights of the public,* and protects from invasion and encroachment the property of the municipality which is held for and devoted to public use, no matter how lax the municipal authorities may have been in asserting the rights of the public.

Id. at 598 (emphasis added). Since that time the *nullus tempus* rule has been found applicable in a long line of cases involving a variety of rights asserted by municipalities, the state, and other subdivisions of the state. *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1989) (negligent design and construction of a municipal water system) (hereafter referred to as "HTB"); *State of Oklahoma ex rel. Jan Eric Cartwright v. Tidmore*, 674 P.2d 14 (Okla. 1983) (recovery of monies wrongfully paid from the state treasury); and, *Herndon v. Board of Com'rs in and for Pontotoc County*, 158 Okla. 14, 11 P.2d 939 (1939) (recovery of county property).

After a detailed review of the line of *nullum tempus* cases, the *HTB* court announced the present-day, general rule that:

> . . . statute of limitations shall not bar suit *by any government entity acting in its sovereign capacity* to vindicate public rights, and that *public policy*

> *requires that every reasonable presumption favor government immunity from such limitation.*

HTB, 769 P.2d at 134 (emphasis added). In a later *nullum tempus* case, the Oklahoma Supreme Court provided unequivocal clarification that "any government entity" includes municipal corporations:

> In *HTB, Inc.*, . . . we recognized that the maxim *nullum tempus occurrit regi* (time does not run against the king) applies to municipal corporations as trustees of the rights of the public.

State ex rel. Schones v. Town of Canute, 858 P.2d 436, 439 (Okla. 1993).

C. The Municipality's Dual Capacity or Function Performed Is Irrelevant To Sovereign Capacity.

Despite the *Schones* Court's announcement of the clear and unconditional holding in *HTB*, Mobil contends the proper application of the *nullum tempus* rule turns on the function performed by the municipal corporation. Petition at 9-15. In essence, Mobil's dual capacity or function performed argument is as follows: (1) municipal corporations have a dual capacity performing both governmental and proprietary functions; (2) operation of a public water supply is a proprietary function; (3) a municipal corporation only acts in a sovereign capacity, and thus the *nullum tempus* rule is applicable, when it is performing a governmental function; and, (4) therefore, since Cyril is operating a municipal water supply as a proprietary function, it is not acting in a sovereign capacity and thus the *nullum tempus* rule has no application. *Id.*

Notwithstanding that precisely the same argument was offered by the *HTB* defendants and expressly rejected by the *HTB* court, Mobil attempts to superimpose such conditions on the *HTB* facts:

> Throughout their arguments the defendants misguidedly equate the governmental/proprietary functions applicable to the principle of sovereign immunity *from* liability with the sovereign's capacity to *bring* an action. Some courts in determining whether the sovereign may claim immunity from statutes of limitation have rested their decision upon the function performed. See e.g., *Reeves v. City of Phoenix*, 1 Ariz. App. 157, 400 P.2d 364 (1965). Established principles of Oklahoma law differ, and in making such a determination the Oklahom [sic] court has focused not upon the function performed, but the ultimate right at issue. In light of the court's abrogation of the common law doctrine of sovereign immunity and the legislative response thereto which eliminated the distinction between governmental and proprietary functions, we would consider it inappropriate to repudiate the existing test in favor of a new one turning on the governmental versus proprietary function.

HTB, 769 P.2d at 134 (original emphasis).

To further dispel any notion that the function performed is not a part of the sovereign capacity determination, the *HTB* court notes that "[n]one of the litigants contest that the operation of a waterworks is a proprietary function. However, the character of the plaintiff's function does not control." *Id.* at 134-35 (citations omitted). Given this unequivocal rejection of the function

performed as a basis for determining sovereign capacity, Mobil's underlying premise is clearly misplaced:

> Since it is *only when a municipality acts in its governmental/legislative role that sovereign capacity attaches*, where a town sues alone the Court *must* examine the function involved to determine whether *part one* of the *HTB* test is satisfied.

Petition at 15 (original emphasis).

Curiously, while Mobil contends above that it is *part one* of the *HTB* test which requires determination of the governmental function in order to establish sovereign capacity, Mobil states earlier that the *HTB* court's discussion of function concerns the *second* part of the *HTB* test:

> Rather, the *HTB* Court's discussion of function concerns the *second* part of the sovereign immunity test – whether the sovereign seeks to enforce public as opposed to private rights.

Id. at 14 (original emphasis). It is not clear whether Mobil is simply confused on this issue or whether it actually believes that determination of the municipality's function is integral to both parts of the *HTB* test.[10]

---

[10] Most likely Mobil is simply confused on this point as the *HTB* court clearly organized its discussion of the case. After a lengthy introduction, the court stated the general rule in the paragraph beginning with "**[1]**" at p. 134 and noted it must determine sovereign capacity and public rights. Discussion of sovereign capacity begins with the next paragraph which is designated "**[2]**" on p. 134 and continues to the middle of the second column on p. 135. At this point, the court begins its discussion of public rights with the paragraph which starts out with "[h]aving found that all plaintiffs appear in their sovereign capacity, we focus finally upon the nature of the rights

Regardless of how many times Mobil contends the function performed test must be applied, Mobil is simply attempting to impose conditions which were categorically rejected by the *HTB* court. The Tenth Circuit correctly recognized that the dual capacity of a municipality is totally extraneous to the determination of sovereign capacity and whether the *nullum tempus* doctrine is applicable. It was on this basis, along with the unequivocal statement in *Schones* that in Oklahoma the *nullum tempus* rule applies to municipal corporations, that the Tenth Circuit correctly reversed the trial court.

III. THERE IS NO REASONABLE BASIS FOR CERTIFYING THE ISSUE OF IMMUNITY FROM LIMITATIONS TO THE OKLAHOMA SUPREME COURT.

A. The Issue of Certification Was Not Properly Preserved Below.

The *nullum tempus* issue has been before the District Court on at least two occasions. It was one of two issues included in Cyril's supplemental brief in response to Mobil's motion for summary judgment, and it was the only issue included in Cyril's brief in support of its motion to reconsider. On each occasion, Mobil argued and briefed the issues before the court, but never once

---

affected . . . " This discussion continues to p. 136 to the paragraph beginning with [4], but contains no discussion whatsoever of dual capacity, function performed, or any other related matters.

urged the court to certify the *nullum tempus* issue. Similarly, the *nullum tempus* issue was raised before the Tenth Circuit and Mobil responded at great length. Again, Mobil failed to urge certification. Mobil's Petition for rehearing to the Tenth Circuit was devoted exclusively to the *nullum tempus* issue, but once again, Mobil never provided any argument or authority with respect to certification. It was only in Mobil's conclusion that it stated with nothing more, "[a]t a minimum, the issue should be certified to the Oklahoma Supreme Court for resolution of this significant matter of state law."

Even assuming certification could be raised in the Tenth Circuit, since it was never raised in the District Court, it should have been raised in Mobil's answer brief on appeal, not in its petition for rehearing. According to Rule 40(a) of the Federal Rules of Appellate Procedure, the purpose of the petition for rehearing is to advise the court of points of fact or law that it has overlooked or misapprehended, not to set forth new issues for the first time. Therefore, since certification was neither argued nor briefed in either the District Court or in the Court of Appeals, it should not be considered on certiorari. *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977).

B. Application of the *Nullum Tempus* Rule to the Cyril Facts Is Not A Close Question.

Mobil notes briefly without comment that Oklahoma and Tenth Circuit precedent have approved application of

a two-year limitations period to cases[11] factually indistinguishable from the Cyril case. Petition at 22; *see also*, Petition at 8-9. Aside from this being support, at least according to Mobil, for certification of the *nullum tempus* issue, Mobil leaves the misimpression that the Tenth Circuit's decision in the *Town of Cyril* is inconsistent with the two cases cited.

However, careful analysis of each case reveals that the *nullum tempus* doctrine was neither raised by any of the parties nor was it considered by either court. Traditionally, review courts do not pass on issues or questions which are not raised by the pleadings or presented to and passed on by the trial court. *Von Stilli v. Young*, 203 Okla. 86, 219 P.2d 224 (1950). Thus, the *Town of Cyril* is not inconsistent with the cases cited by Mobil because it results from totally different legal issues.

The primary thrust of Mobil's argument for certification is that because of the dual capacity of municipal corporations, application of the *nullum tempus* rule results in a close legal question which should be answered by the Oklahoma Supreme Court. Petition at 18-24. Mobil would frame the question for certification as follows: " . . . whether a municipal corporation suing alone for money damages for injury to its municipal water source enjoys sovereign immunity from statutes of limitation." *Id.* at 22. This, however, was not a close question in either the District Court or Court of Appeals.

---

[11] Mobil cites *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50 (10th Cir. 1936) and *Shell Petroleum Corp. v. Town of Fairfax*, 180 Okla. 326, 69 P.2d 649 (1937).

In response to Cyril's motion to reconsider in the District Court, Mobil exhaustively argued and briefed the dual capacity/function performed issue. R. Aplt. App. 325-45. Never once did the District Court acknowledge this argument in its Order of October 13, 1992. Petition App. at 20-24. Without the benefit of *Schones* and despite substantial language to the contrary in *HTB*, the District Court was persuaded that the claims of the municipal plaintiff in *HTB*, Oklahoma City, were preserved only because they were asserted for the City's benefit by the trust plaintiffs, and thus the City was not acting in a sovereign capacity. *Id.* at 22-24.

Once *Schones* became available, and with (1) its unequivocal pronouncement that the *nullum tempus* rule in *HTB* applied to municipal corporations, and (2) the *HTB* court's explicit rejection of any dual capacity or function performed test, the Tenth Circuit panel unanimously found the *nullum tempus* doctrine was applicable. Even after an exhaustive reiteration of the *HTB/Schones* issues in Mobil's petition for rehearing, not one member of the Tenth Circuit panel or any of the other six active members of the court were persuaded rehearing was needed. *Id.* at 7-8. Accordingly, had certification been properly preserved and urged, the Court of Appeals did not abuse its discretion in failing to certify the state law issue to the Oklahoma Supreme Court because proper application of the *nullum tempus* doctrine was clearly established.

CONCLUSION

Mobil correctly points out that the issues involved are purely state law. Petition at 18. This Court does not ordinarily grant certiorari to review questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Instead, the Court " . . . generally accord[s] great deference to the interpretation and application of state law by the courts of appeal." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). Mobil presents no reason for the Court to deviate from its usual practice in this regard. Therefore, Cyril respectfully requests that certiorari be denied.

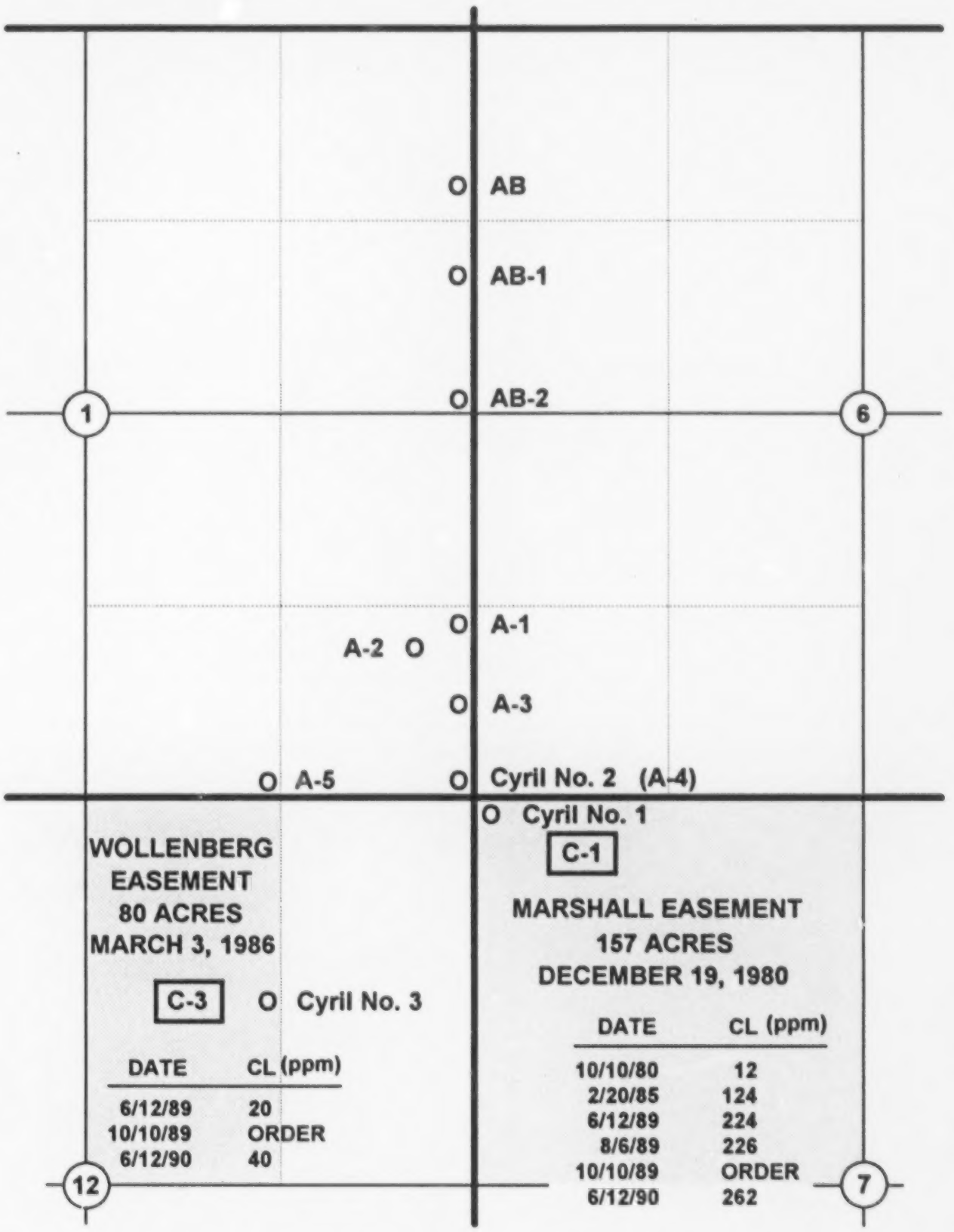
Respectfully submitted,

D. Craig Shew
Counsel of Record

Michael G. Smith
James R. Scrivner
The Law Office Of
Smith, Shew & Scrivner, P.C.
P. O. Box 1373
Ada, OK 74820
(405) 332-9033

Attorney for Respondent

LOCATION MAP - - CYRIL WATER WELLS



LEGEND: O WATER WELL